Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-782.

PIPELINE CONSTRUCTION COMPANY, INC.,
PETITIONER,

v.

HARVEY JAFFEE ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Respondents in Opposition.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Brief of Respondents in Opposition.

Opinion Below.

The decision of the court below (Pet. App. A-5) is reported at Mass. App. Ct. Adv. Sh. (1978) 632.

Jurisdiction.

The decision of the court below was entered on May 31, 1978. Petitioner has invoked the jurisdiction of this court pursuant to 28 U.S.C. § 1257(3) (1970). The respondents respectfully submit that this Court lacks jurisdiction under 28 U.S.C. § 1257(3) (1970) because no federal question was raised, involved or in fact decided in the lower court, and that the petition is untimely under the provisions of 28 U.S.C. § 2101(c) (1970).

Questions Presented.

1. Has petitioner satisfied the jurisdictional requirements of 28 U.S.C. § 1257(3) (1970)?
2. Did petitioner file its petition for writ of certiorari within the time prescribed by law?
3. Should this Court exercise its discretion to grant certiorari to review the questions which petitioner raises in its petition?

Statement of the Case.

This legal malpractice action was commenced in the Superior Court of Massachusetts, Suffolk County, by writ dated August 7, 1969. On April 21, 1977, the trial court entered judgment for the respondents after denying petitioner's motion for a new trial. On May 19, 1977, petitioner filed its notice of appeal from the entry of this judgment to the Appeals Court of Massachusetts (Appeals Court No. 77-592) [hereinafter "No. 77-592"]. Shortly after the appeal in No. 77-592 was docket-

ed, petitioner moved that the Appeals Court grant it an extension of time of 90 days in which to file its brief and appendix (No. 77-592, CP-3).[1] The Appeals Court allowed this motion on August 10, 1977 (No. 77-592, CP-3). On November 9, 1977, petitioner moved for an additional 90-day extension of time (No. 77-592, CP-4). Respondents filed a motion objecting to petitioner's motion for a further extension of time (No. 77-592, CP-5). On November 16, 1977, a single justice of the Appeals Court, Hale, C.J., denied petitioner's motion (No. 77-592, CP-4). Pursuant to the provisions of Appeals Court Standing Order No. 17 (Pet. App. A-2), the Clerk of the Appeals Court gave notice to the petitioner that its appeal in No. 77-592 would be dismissed for lack of prosecution because petitioner had not filed a brief or appendix (No. 77-592, CP-6).

Thereafter, on December 1, 1977, petitioner moved for reconsideration of the single justice's denial of its motion for a further extension of time (No. 77-592, CP-7). Although a single justice, Hale, C.J., allowed petitioner's motion for reconsideration, he ordered that the original denial of petitioner's motion for a further extension of time was to stand (No. 77-592, CP-7). On December 9, 1977, the Clerk of the Appeals Court filed a dismissal of No. 77-592 under Standing Order No. 17 (No. 77-592, CP-8).

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[1] References preceded by "CP" are to the certified copies of the papers which constitute the records in the lower court. Since petitioner did not request the Clerk of the Appeals Court to certify the papers which constitute the records in that court and transmit those records to this Court, respondents requested said Clerk to so certify and transmit the records. *See* Sup. Ct. R. 21(1). A copy of respondents' request was sent to petitioner (No. 77-592, CP-14; No. 77-1125, CP-15). *See* Sup. Ct. R. 21(1). Respondents have transmitted certified copies of the aforementioned records to this Court along with this brief.

Pursuant to the provisions of Rule 15(c) of the Massachusetts Rules of Appellate Procedure (AR-I)[2] and Appeals Court Rule 2:02 (AR-II), petitioner filed a notice of appeal from the entry of the single justice's order denying its motion for a further extension of time (No. 77-592, CP-11).

On December 14, 1977, a single justice of the Appeals Court, Hale, C.J., granted petitioner's motion to "stay all proceedings" in No. 77-592 pending the further order of the Appeals Court or the determination of an appeal from his prior order denying petitioner a further extension of time in which to file its brief and appendix (No. 77-592, CP-10).

The latter appeal from the single justice's order in No. 77-592 was designated Appeals Court No. 77-1125 [hereinafter "No. 77-1125"].

On May 31, 1978, after consideration of the briefs and appendix filed in No. 77-1125, a panel of the justices of the Appeals Court, pursuant to the provisions of Appeals Court Rule 1:28 (AR-III), entered an order (No. 77-1125, CP-11) summarily affirming the single justice's order denying petitioner's motion for a further extension of time (No. 77-592, CP-4).

On June 24, 1978, petitioner filed a motion for leave to apply late for further appellate review by the Supreme Judicial Court (No. 77-1125, CP-12) pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure (AR-IV), and an application for such review (No. 77-1125, CP-12). Although the Supreme Judicial Court allowed petitioner's motion to file its application late, it declined to review the order of the Appeals Court in No. 77-1125. Mass. Adv. Sh. (1978) 2285, 2286 (No. 77-1125, CP-14).

On November 13, 1978, petitioner filed a petition for a writ of certiorari in this Court pursuant to the provisions of 28 U.S.C. § 1257(3) (1970).

[2] References preceded by "AR" are to the appendices to this brief.

Argument.

I. This Court does Not Have Jurisdiction under 28 U.S.C. § 1257(3) (1970) to Grant Certiorari in this Case.

This Court does not have jurisdiction under 28 U.S.C. § 1257(3) (1970) to review by writ of certiorari the order of the Appeals Court of Massachusetts in No. 77-1125[3] summarily affirming the single justice's denial of petitioner's request for a further extension of time in which to file its brief and appendix in No. 77-592.

This Court has clearly established that a threshold jurisdictional requirement for Supreme Court review of state court decisions is that the tendered federal questions must have been duly presented to the state court with fair precision. *Vachon* v. *New Hampshire*, 414 U.S. 478, 483-484 (1974), *reh. denied*, 415 U.S. 952 (1974); *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) (per curiam); *Hill* v. *California*, 401 U.S. 797, 805 (1971); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). This jurisdictional requirement is predicated on the statutory language of 28 U.S.C. § 1257(3) (1970) providing for Supreme Court review of federal matters that have been "drawn in question" or "specially set up or claimed." *Chambers* v. *Mississippi*, 410 U.S. 284, 308-309 (1973) (Rehnquist, J., dis-

[3] Respondents submit that the panel of justices' order in Appeals Court No. 77-1125 is the only decision in this case which satisfies the "highest court of a State in which a decision could be had" jurisdictional requirement of 28 U.S.C. § 1257(3) (1970). The order of the Supreme Judicial Court declining review of the Appeals Court's order in No. 77-1125 does not satisfy this jurisdictional requirement. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 678 n.1 (1968); *American Ry. Exp. Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923); *Bacon* v. *Texas*, 163 U.S. 207, 215 (1896); R. L. Stern & E. Gressman, *Supreme Court Practice* § 3-22, at 88-89 (3d ed. 1962); 7B J. Moore, *Federal Practice* § 1257, at JC-379 (1978). See *Chicago & E. Ill. R. Co.* v. *Commission*, 284 U.S. 296, 297-298 (1932).

senting). In addition to its statutory basis, this Court in *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969), set forth other sound reasons in support of this requirement:

> "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them."

Because this requirement is jurisdictional, the petitioner has the burden of affirmatively establishing that the federal questions tendered to this Court were presented to the Appeals Court in No. 77-1125. *Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974); *Street* v. *New York*, 394 U.S. 576, 582 (1969); *Department of Mental Hygiene of Cal.* v. *Kirchner*, 380 U.S. 194, 197 (1965); *Gorman* v. *Washington University*, 316 U.S. 98, 101 (1942); *Memphis Gas Co.* v. *Beeler*, 315 U.S. 649, 651 (1942). *See Raley* v. *Ohio*, 360 U.S. 423, 435 (1959); Sup. Ct. R. 23(1)(f). The lower court record must demonstrate that the federal questions submitted for review were raised and decided in that court. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969); *Crowell* v. *Randell*, 10 Pet. 368, 391 (1836). *See*

DeBacker v. *Brainard*, 396 U.S. 28, 32 (1969) (per curiam). Respondents submit that any doubts as to the existence of jurisdiction must be resolved against the petitioner. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70-71 (1948).

In the present case petitioner has not satisfied its burden of establishing that the court has jurisdiction under 28 U.S.C. § 1257(3) (1970) to grant its petition for a writ of certiorari. The Appeals Court record in No. 77-1125 fails to demonstrate that petitioner raised its tendered federal constitutional questions in that state court proceeding,[4] or that the Appeals Court in No. 77-1125 in fact considered or decided those questions, or that such questions were necessarily involved in the disposition of that appeal. *See, e.g., Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969); *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U.S. 254, 269 (1891). Petitioner seeks to raise its purported federal constitutional claims for the first time in this Court. Accordingly, respondents submit that this Court lacks jurisdiction under 28 U.S.C. § 1257(3) (1970) to review by writ of certiorari the order of the Appeals Court in No. 77-1125.

II. Petitioner did Not File its Petition for Writ of Certiorari Within the Time Prescribed by Law.

By statute, 28 U.S.C. § 2101(c) (1970), petitioner was required to file its petition for writ of certiorari within 90 days after the entry of the judgment tendered to this Court for review. *See* Sup. Ct. R. 22(3). The Appeals Court in No.

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[4] In addition, petitioner did not raise its asserted federal constitutional claims in No. 77-592 or in its application for further appellate review in the Supreme Judicial Court.

77-1125 entered its order on May 31, 1978 (No. 77-1125, CP-11). Petitioner filed its petition for a writ of certiorari on November 13, 1978, *i.e.*, well beyond the 90-day period prescribed by law. Accordingly, since petitioner was untimely in filing its petition and did not properly apply for and obtain an extension of time for such late filing,[5] respondents respectfully submit that this Court should not entertain this petition.[6]

III. This Court Should Decline to Grant Certiorari to Review the Questions which Petitioner Raises in its Petition.

In addition to the jurisdictional objections to the granting of certiorari in this case, there are other sound reasons why this Court should dismiss this petition.

Petitioner is advancing its alleged federal constitutional claims for the first time in this Court; and, accordingly, the record is clearly inadequate to provide the proper foundation for a reasoned and informed consideration of these claims.

Furthermore, to the extent that petitioner is claiming that it was deprived of its right to an oral argument by the action of the single justice in No. 77-592, respondents submit that both this Court and the Supreme Judicial Court have held that there is no general constitutional right to have appellate oral argument. *See, e.g., FCC* v. *WJR*, 337 U.S. 265 (1949); *Price*

[5] *See* Sup. Ct. R. 22(4); Sup. Ct. R. 34(2).

[6] The temporal requirement prescribed in 28 U.S.C. § 2101(c) (1970) has been considered "jurisdictional" in nature. *See Toledo Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Teague* v. *Regional Commissioner of Customs*, 394 U.S. 977, 982 (1969) (Black, J., dissenting); R. Stern & E. Gressman, *Supreme Court Practice* § 6-1, at 202 (3d ed. 1962); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure* § 4004, at 523 (1977).

v. *Johnston*, 334 U.S. 266, 286 (1948); *Sabatinelli* v. *Travelers Ins. Co.*, Mass. Adv. Sh. (1976) 384, 388. *See Schwartz* v. *Bressler*, Mass. App. Ct. Adv. Sh. (1977) 333.

Finally, petitioner neither presents any important issue for this Court's consideration nor does it advance "special and important reasons" (Sup. Ct. R. 19(1)) to support the granting of its petition. In essence, petitioner seeks review in this Court of a lower state court's exercise of discretion in declining to grant it a further extension of time in which to file its brief and appendix in No. 77-592. Jurisdictional infirmities aside, respondents submit that clearly this is not the type of case appropriate for review in this Court.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix I.

Massachusetts Rule of Appellate Procedure 15(c).

Power of a Single Justice to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single justice may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice may not dismiss or otherwise determine an appeal or other proceeding, and except that the appellate court may provide by order or rule that any motion or class of motions shall be acted upon by the appellate court. The action of a single justice may be reviewed by the appellate court.

Appendix II.

Appeals Court Rule 2:02.

The review of the action of a single justice which is afforded by the last sentence of paragraph (c) of Rule 15 of the Massachusetts Rules of Appellate Procedure shall be by a panel of other justices of this court, shall be claimed by an appeal to such a panel, and shall be prosecuted in the same manner as if the single justice were the "lower court" within the meaning of paragraph (c) of Rule 1 of said Rules. See paragraphs (a) and (b) of Rule 1 of said Rules.

Appendix III.

Appeals Court Rule 1:28.

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court, acting on its own motion and either with or without entertaining oral argument, may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below. Any such order shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

Appendix IV.

Massachusetts Rule of Appellate Procedure 27.1(a).

Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.